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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF AMICI CURIAE OF MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AMERICAN PETROLEUM INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, AND EDISON ELECTRIC INSTITUTE, ALABAMA POWER CO., *ET AL.*, IN SUPPORT OF PETITIONER

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INTRODUCTION

On behalf of their respective members, the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA"), the American Petroleum Institute ("API"), Chemical Manufacturers Association ("CMA"), and Edison Electric Institute, Alabama Power Co., *et al.*, jointly submit this brief *amici curiae* in support of petitioner General Motors Corporation.[1]

[1] This brief is filed with the written consent of the parties, pursuant to Supreme Court Rule 36.1. Letters of consent are on file with the Clerk of the Court.

MVMA is a voluntary non-profit association of domestic companies engaged in the manufacture and sale of motor vehicles in the United States. MVMA's members assemble ninety-seven percent of the cars, trucks, and buses produced in the United States and operate more than three hundred manufacturing facilities.

API is a national trade association with over two hundred companies as members, representing all facets of the petroleum industry: exploration, production, transportation, refining, and marketing.

CMA is a trade association whose member companies produce, market, and use industrial chemicals. Its members make up more than ninety percent of the productive capacity for basic industrial chemicals in the United States.

Edison Electric Institute, Alabama Power Co., *et al.*, comprises fifty-nine individual electric utilities and three trade associations: Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. This umbrella group participates in major rulemaking and litigation under the Clean Air Act.

The members of MVMA, API, CMA, and Edison Electric Institute, *et al.*, operate a wide range of facilities, most of which are subject to local, state, and federal air pollution control regulations. Their members, therefore, have a stake in the outcome of this litigation. All four associations represent the interests of their respective members before government agencies, in Congress, and in the courts, frequently appearing as a party or *amicus curiae* in litigation involving important environmental issues.

With respect to the issues in this case, the collective interests of their members coincide with the interest of General Motors and with the public interest. Like General Motors, their members often find themselves struggling to determine the appropriate method of compliance with air pollution control regulations in the face of conflicting federal and state requirements. These conflicts arise directly from the failure of the Environmental Protection Agency ("EPA" or "Agency") to approve or disapprove a revision to a State Implementation Plan ("SIP") within the four month deadline established by statute.

In the decision below, *United States v. General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989), *cert. granted*, —— U.S. ——, 110 S.Ct. 537 (1989) (*"General Motors"*), the First Circuit Court of Appeals addressed two major issues: (1) whether the statutory four month deadline for EPA to take action when EPA reviews a SIP also applies to EPA's review of SIP revisions, and (2) if so, whether EPA may enforce the existing SIP when it has failed to timely take action on a SIP revision. We are not separately briefing the issue of the applicability of the four month requirement to SIP revisions. We rely on the arguments presented by General Motors on this issue and on the uniform holdings of the courts of appeals that have considered the issue.[2]

SUMMARY OF ARGUMENT

A bar on enforcement of the prior State Implementation Plan (SIP) is the only appropriate remedy for EPA's failure to reach a decision on a SIP revision within four months. EPA has deliberately used its enforcement authority in combination with delayed SIP reviews to overturn state pollution control decisions. In

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[2] *See United States v. Alcan Foil Products*, 889 F.2d 1513, 1518 (6th Cir. 1989); *United States v. General Motors Corp.*, 876 F.2d 1060, 1066 (1st Cir. 1989), *cert. granted*, —— U.S. ——, 110 S.Ct. 537 (1989); *American Cyanamid Co. v. EPA*, 810 F.2d 493, 495 (5th Cir. 1987); *Council of Commuter Organizations v. Gorsuch*, 683 F.2d 648, 651-652 n.2 (2d Cir. 1982). *See also Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983).

doing so, it has stepped outside the secondary role intended for it by Congress in the determination of local air pollution control strategies.

The First Circuit erred in fashioning a remedy for EPA's delay that would allow district courts to reach their own determination of the "reasonableness" of the delay. Congress specified the four month deadline to ensure that EPA would act consistently with its secondary role. The lower courts cannot substitute their judgment on what EPA's role should be or how long EPA's review should take.

EPA's own studies demonstrate that the four month deadline is reasonable and attainable. The Agency has failed to meet the deadline because, directly counter to Congressional intent, it has used the SIP review process to "micromanage" state decisions.

The four month deadline also serves a central role in the statute by preventing prolonged periods of inconsistency between state and federal law. The statute is premised on a complementary state and federal system. EPA's interpretation of the "applicable implementation plan" under which it may bring an enforcement action without regard to the four month deadline destroys this complementary relationship. It places individual sources in the untenable position of having to choose between compliance with state or federal law; it allows EPA to avoid its decisional responsibilities under the Act; and it is inconsistent with the remainder of the statute.

Finally, the Agency claims that unabridged enforcement powers are necessary to prevent a flood of improper SIP revisions. There is no factual basis for the Agency's concern. And even if there were, Congress has provided other sufficient mechanisms for the EPA to respond to such alleged, but unproven, state abuses.

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ARGUMENT

I. BACKGROUND: THE STATE IMPLEMENTATION PLAN REVISION PROCESS

The Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7401 *et seq.* (1982),[3] establishes a balanced federal-state regulatory partnership for the attainment and maintenance of national ambient air quality standards. This Court has already described the essential contours of the partnership: EPA has the responsibility for setting the national air quality standards, but it has only a "secondary role" in determining the source-by-source controls necessary to achieve the standards. The principal responsibility for that function rests with the states and local governments. *Train v. NRDC*, 421 U.S. 60, 79 (1975).

The SIP is the main building block of the Act and embodies the cooperative effort between the federal and state governments. In its most straightforward form, the Act envisions that the states will develop SIPs that contain the mix of control strategies that both best fit local needs and achieve the national standards; EPA will review and approve the SIP; and the particular measures contained in the SIP will then be enforceable as a matter of state and federal law.

The SIP, however, is not a static set of emission limitations and controls. Congress recognized that local needs and control strategies would evolve over time and that SIPs would have to change as well. The Act, therefore, contains several provisions either directing or allowing SIP revisions. In each of these provisions, the responsibility for developing the SIP revision rests squarely with the state, although EPA is given the opportunity, as a last resort, to promulgate a federal plan. The three principal provisions involve (1) SIP submissions in re-

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[3] All references herein to 42 U.S.C. are to the 1982 edition.

sponse to a change in a national ambient air quality standard, CAA § 110(a)(1), 42 U.S.C. § 7410(a)(1); (2) SIP revisions in response to a determination that the SIP "is substantially inadequate" to achieve the national standards, CAA § 110(a)(2)(H), 42 U.S.C. § 7410(a)(2)(H); and (3) SIP revisions initiated by the state—*e.g.*, to correct technical deficiencies in the SIP, to tighten or relax control requirements, or to encourage innovative technologies, CAA § 110(a)(3)(A), 42 U.S.C. § 7410(a)(3)(A).[4]

Because a SIP revision represents a change from the mutually agreed upon federal and state plan, it poses the potential for discordance between the applicable federal and state requirements.[5] Timely action by the Agency on a SIP revision is, therefore, not just a matter of Congress's general interest in expeditious environmental improvement; it is essential to preserve the complementary relationship between state and federal law under the Act.

The issue presented in this case involves the third category of SIP revisions outlined above: a SIP revision submitted by the state on its own motion. Under the statute, EPA has four months in which to approve or disapprove the state revision.[6] EPA "shall approve" the revision if it meets the basic requirements of the Act and has been adopted "after reasonable notice and public hearings." CAA § 110(a)(3)(A), 42 U.S.C. § 7410(a)(3)(A). Clearly, if EPA disapproves the revision within that time, the prior SIP remains in effect and the federal decision governs. *Train*, 421 U.S. at 92. As this Court noted in *Train*, "[v]ariances under section 110(a)(3) cannot be granted until first the state, and then the

[4] The corresponding federal promulgation authority is set forth at CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1).

[5] Indeed, the Act requires that a state "adopt," not simply propose, its SIP or SIP revision as a precondition to submittal to the Agency. CAA § 110(a)(1), 42 U.S.C. § 7410(a)(1).

[6] *See supra* n.2.

Agency, have determined that they will not jeopardize the standards." *Id.* at 93 n.28. The Act thus contemplates that a *decision* by EPA can override the state's determination on the appropriateness of specific emissions controls.

EPA, however, has struck upon a new mechanism for asserting federal control over state decisions. It delays decision on the SIP revision and, in the interim, brings an enforcement action against individual sources based on the prior SIP. Extending the rationale of *Train* to the breaking point, EPA takes the position that, unless and until it approves the state SIP revision, the prior SIP remains in effect and the Agency can enforce it—without regard to the four month limitation of section 110(a)(3)(A). In this fashion, through inaction on the state submission and through use of its enforcement authority, the Agency can exercise a "pocket veto" over the state's judgment on the appropriate emission limitations for particular sources. Congress never intended, and the statute does not countenance, this abuse of the SIP revision process.

Several circuits have addressed the issue of which remedy is proper when EPA has failed to take action on a SIP revision within the statutory four month period. Three different approaches have emerged.

The first court of appeals to address the issue was the D.C. Circuit, in *Duquesne Light Co. v. EPA*, 698 F.2d 456 (D.C. Cir. 1983). In *Duquesne*, the Court held that when EPA is delinquent in taking action on a revision, EPA must "hold the noncompliance penalty in abeyance pending final action on the SIP." *Id.* at 472. However, the Court limited the remedy by providing that if EPA ultimately rejects the SIP revision, the penalty should be calculated back to the four month deadline, with interest. *Id.*

In contrast, the Fifth Circuit in *American Cyanamid Co. v. EPA*, 810 F.2d 493 (5th Cir. 1987), held that the

proper remedy is to bar EPA from enforcing the original SIP until and unless it rejects the SIP revision. *Id.* at 502. The Fifth Circuit explicitly rejected the *Duquesne* limitation that would allow back calculation of penalties, stating that

> [t]he *Duquesne* holding provides little or no incentive to the EPA to abide by [section 110's] four month rule; the EPA loses nothing by its contumaciousness.

American Cyanamid, 810 F.2d at 499 (footnote omitted).

A third approach is found in the opinion below in this case, *General Motors*, 876 F.2d 1060. After rejecting the approaches of the D.C. and Fifth Circuits, the First Circuit formulated a rule under which the district courts must inquire into the reasonableness of EPA's failure to act and take that factor into account in determining the amount of penalties to be imposed. The Court also concluded that a citizen suit under CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2), to compel EPA action on a pending SIP revision provides a satisfactory alternative remedy.

The Sixth Circuit adopted a variation of the First Circuit "reasonableness" rule in *United States v. Alcan Foil Products*, 889 F.2d 1513 (6th Cir. 1989). The Sixth Circuit articulated a shifting burden of proof under that rule:

> If the source demonstrates that it has met the standards of the proposed revision, the government has the burden of justifying EPA's delay in acting on the proposal. The court must then balance the reasonableness of the delay against whatever prejudice the source is able to establish.

Id. at 1521.

The First Circuit in the decision below made three critical errors in analyzing the consequences of EPA's missing the four month deadline of section 110(a)(3)(A): the Court did not analyze the interrelationship between the four month deadline and the Congressional intent that EPA's role in the SIP process be "secondary"; it assumed without analysis that the four month deadline is unrealistic; and it did not relate its conclusion on the enforceability of the prior plan to the remainder of the statute. When these points are considered, it is clear that the Fifth Circuit was correct in concluding that an enforcement bar is necessary.

II. THE FOUR MONTH DEADLINE IS A NECESSARY ASPECT OF EPA'S SECONDARY ROLE IN THE SIP PROCESS

There are only two mechanisms explicitly set out in the statute that allow EPA to impose requirements more stringent than those adopted by a state.[7] First, EPA can promulgate its own plan under section 110(c), 42 U.S.C. § 7410(c); second, EPA can disapprove a state plan as specified in section 110(a), 42 U.S.C. § 7410(a).

Direct federal promulgation under section 110(c) is an authority that the Agency has rarely exercised.[8] And there are obvious reasons for the Agency's hesitance to

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[7] A state is not precluded from adopting more stringent regulations on its own. *See* CAA § 116, 42 U.S.C. § 7416.

[8] *See, e.g.*, 52 Fed. Reg. 45,466, 45,467 (1987) (In considering promulgation of Federal Implementation Plan ("FIP") for Maricopa and Pima Counties in Arizona, EPA recognized that "EPA must try to serve the general principles of the Clean Air Act, including the goal of minimizing the amount of federal intrusion into an area that is primarily the State's responsibility."); 53 Fed. Reg. 17,378, 17,380 (1988) (EPA cautioned, in the same matter, that statutory scheme prefers State plans to federal plans because "the implementation of air pollution control measures in an area is always facilitated if carried out at the State level, and clearly Congress intended such planning to be done by the States.") With respect to both Maricopa and Pima Counties, EPA ultimately concluded that promulgating a FIP would be unnecessary. 53 Fed. Reg. 30,220 (1988); 53 Fed. Reg. 30,224 (1988).

use this authority: it represents a clear intrusion on state prerogatives, it is a measure that has proven historically to be politically unpopular, and direct federal promulgation is resource intensive for EPA. The Agency's principal experiment with direct federal promulgation occurred in the mid-1970s when it mandated local transportation control measures, such as bridge tolls, parking surcharges, and gas rationing. This touched off a legal and political controversy that ended with Congress, in the 1977 Clean Air Amendments, stripping EPA of authority to require such transportation control measures. *See* CAA § 110(c)(2)-(5), 42 U.S.C. § 7410(c)(2)-(5).

The practical and legal restraints on direct federal promulgation dovetail with the Congressional division of responsibility between EPA and the states. Congress specifically intended that EPA *not* engage in "micromanagement" of SIPs:

> The Federal role must be one of support rather than control. The Federal Government does not have and will not have the resources required to do an effective job of running the air pollution control programs of the states. And yet the Federal Government can and must provide the technical information and enforcement assistance that states and localities need. Fulfilling this latter role effectively will protect and enhance air quality more than fulfilling the former role inadequately.

S. Rep. No. 95-127, 95th Cong., 1st Sess. 10, 10-11 (1977).

By making direct federal promulgation both a visible and difficult process, Congress provided an inherent check on any EPA tendency to "run" a state's air pollution control program. The four month deadline for SIP review serves a comparable function. Congress gave the states nine months to develop a SIP or SIP revisions under section 110(a)(1); it is not accidental that EPA was given less than half that time to serve its review function. The

limited scope of review which Congress intended EPA to perform is also reflected in the language of section 110(a)(2)(H), 42 U.S.C. § 7410(a)(2)(H), which contemplates that a SIP must be "substantially inadequate" before the Administrator may require revision. The guiding principle of the Clean Air Act and of other federal environmental statutes, such as the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1982), is that EPA should accept state-approved pollution control strategies as long as those strategies are not clearly outside the requirements of the statute.[9]

Congress recognized that "[t]he problem of air pollution exists at the state and local level. That is where the public understands the problem . . . . Public problems must be solved at the level of government most capable of dealing with them." S. Rep. No. 95-127, 95th Cong., 1st Sess. 10, 10 (1977). Congress did not intend for EPA to spend its resources poring over the details of state submissions or making particularized decisions for the states, and the four month deadline reflects that fact. Yet, as discussed in greater detail below,[10] that is what EPA has consciously done.

Both the First Circuit in *General Motors* and the Sixth Circuit in *Alcan* tacitly accepted the view that EPA's

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[9] In discussing the analogous issue of EPA review of state-issued discharge permits under the Clean Water Act, Congress made clear that the Administrator may not

> substitute his judgment for that expressed by the State in its proposed permit; EPA may object to a State proposed permit only in a case in which limitations and conditions of the State permit are clearly outside the guidelines and requirements of this act . . . . The role of the Administrator in reviewing state-proposed permits [is thus] analogous to that of a Federal Court reviewing the action of the administrative agency . . . .

House Debate on H.R. 3199, 95th Cong., 1st Sess. (statement setting forth the views of House conferees), *reprinted in* 3 Legislative History of the Clean Water Act of 1977, 299 at 346.

[10] *See infra* pp. 15-17.

missing the deadline amounted to only a procedural failure and concluded that "[t]he public should not suffer because of EPA's failures." [11] *Alcan*, 889 F.2d at 1520; *General Motors*, 876 F.2d at 1067. Both Courts contemplated a remedy for the failure in which a district court would weigh the "reasonableness" of EPA's delay. They apparently concluded that the public interest would be better served if EPA takes a "reasonable" amount of time reviewing the details of state SIP submissions. But that is not what Congress concluded. Congress reached the judgment that, in the long run, the national goal of clean air would be better served by EPA's playing a "secondary role" in the SIP development process. As the legislative history indicates, Congress believed that "[f]ulfilling this latter role [the secondary role] effectively will protect and enhance air quality *more* than fulfilling the former role [running state air programs] inadequately." S. Rep. No. 95-127, 95th Cong., 1st Sess. 10, 10-11 (1977) (emphasis added). The Courts below should not

[11] The Court of Appeals below cited *Brock v. Pierce County*, 476 U.S. 253 (1986), as support for its position. *General Motors*, 876 F.2d at 1068. But *Brock* is materially different from this case. In *Brock* the Government's failure to observe the deadline *did* amount to only a procedural failure. Because the statutory scheme at issue in *Brock* was not premised on the cooperative federalism model, the Government's delay did not compromise the basic structure of the statute established by Congress. Here, as the Fifth Circuit correctly pointed out in *American Cyanamid*, "[t]he issue . . . is not so much [the violation by the source] but the *default of the EPA in carrying out the congressional intent to work in close cooperation with the states* in implementing standards and enforcing the Clean Air Act. *American Cyanamid*, 810 F.2d at 500 (emphasis added).

Second, the misuse of funds in *Brock* was a completed act, not subject to extension by the Government's delay. Here, in contrast, the EPA's delay directly increases the source's exposure to potential penalties. Third, this Court in *Brock* considered whether the Government *waived* its right to recover the misused funds. The remedy in *American Cyanamid* for which we argue is not nearly as drastic as the waiver considered in *Brock*, because it does not bar EPA from ultimately disapproving a SIP revision, and it does not permanently bar enforcement of an existing SIP. *See infra* n.27.

have substituted their judgment on the public interest for Congress's.

Furthermore, it is difficult to structure a "reasonableness" test for EPA's delay unless there is a predicate determination of what EPA is supposed to be doing in its review. Nine months might be a reasonable period of time for extensive review of all the details of a SIP submission; it is not reasonable for the secondary role described by Congress. Congress specified the reasonable time for that function: four months. The result of a process in which every district court reaches its own assessment of EPA's proper role in SIP reviews is likely to be confusion and a muddied compromise under which EPA serves *neither* of its roles effectively.

The Courts below may have been influenced in reaching their conclusions by a sense that the four month deadline is unattainable. The First Circuit noted that "EPA inevitably will often miss the deadline," *General Motors*, 876 F.2d at 1067, and the Sixth Circuit queried whether "the requirement is unrealistic." *Alcan*, 889 F.2d at 1520. Both Courts were then led to seek a "less drastic" remedy than the enforcement bar. These concerns are misplaced. EPA is missing the deadline because it persists in attempting to manage state SIP revisions in minute detail, counter to Congress's express intent. Indeed, the filing of enforcement actions during the pendency of a SIP revision is part of a pattern of deliberate EPA activity in which the Agency seeks to override state decisions outside of the limited provisions specified in the Clean Air Act.

III. THE FOUR MONTH DEADLINE IS REASONABLE AND ATTAINABLE

The lower courts' perception that delay in the SIP review process is an "inevitability" is unsubstantiated and inaccurate. The delay is a matter of the Agency's own choice and its decision to use the SIP review process to assert control over state decisions in a manner that Congress rejected.

First, the four month deadline is not unrealistic. The Clean Air Act already specifies that a state's SIP revision must be adopted "after reasonable notice and public hearings." CAA § 110(a)(3)(A), 42 U.S.C. § 7410(a)(3)(A). The federal regulatory process is, therefore, not the only public airing of the issues involved in a SIP revision; in fact, the state process itself is a lengthy one, often taking years to complete.[12] EPA has chosen to proceed sequentially, rather than concurrently, with the state's public review process. But that is a choice the Agency has made, not one mandated by statute.

In the early 1980s, EPA initiated a program aimed at shortening the time for SIP review. 46 Fed. Reg. 44,476 (1981); 47 Fed. Reg. 27,073 (1982). A cornerstone of the program was a "parallel processing" approach under which the "State and EPA propose the regulation at the same time, announce concurrent comment periods, and jointly review the comments." 47 Fed. Reg. 27,073, 27,074 (1982). EPA found that the parallel processing approach resulted in a *total* time of 128 days for review, on average—almost exactly the statutory requirement. *Id.*[13] EPA, however, dropped its parallel processing program.[14]

The Agency did not return to the issue of shortening SIP review time until 1987—just after the Fifth Circuit's decision in *American Cyanamid*. At that point, the Agency commissioned a "senior level task group" to assess the problem of SIP delays and to make recommendations for change. Their report was completed in October 1987,[15] and the Agency made proposals to implement their recommendations in January 1989. 54 Fed. Reg. 2138 (1989); 54 Fed. Reg. 2214 (1989).

There are several aspects of the Agency's own analysis that deserve note in the context of this case. First, notwithstanding the then nearly uniform holdings of the courts of appeals that the Agency has a statutory obligation to review SIP revisions within four months,[16] EPA's internal target for reviewing SIPs was *14* months—a target that was often missed. 54 Fed. Reg. 2214, 2215 (1989). And the Agency gave no indication that it would even attempt to meet the statutory deadline.

Second, according to the senior level report, the average number of SIP submittals is 350 per year. Approximately fifty percent of these involve imposition of a new regulation, ten percent an administrative clarification, and twenty percent a source specific "relaxation."[17] Thus, contrary to EPA's intimations, the SIP review system is *not* flooded with states seeking to relax requirements. In fact, most SIP revisions involve *stricter* control requirements.

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[12] There has been dispute over whether EPA approval of SIP submissions constitutes rulemaking covered by the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982). *Compare Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 170-71 (6th Cir. 1973), *cert. denied sub nom. Big Rivers Electric Corp. v. EPA*, 425 U.S. 934 (1976), *with Indiana and Mich. Elec. Co. v. EPA*, 509 F.2d 839, 846-47 (7th Cir. 1975). The Agency has, however, concluded that rulemaking is required, and the courts have accepted that conclusion. *See, e.g., New Jersey v. EPA*, 626 F.2d 1038 (D.C. Cir. 1980).

[13] This time period should not be construed as EPA's "best" attempt to comply with the four month requirement, because the Agency has maintained that the requirement does not apply to SIP revisions.

[14] To our knowledge, the EPA has never explained its decision to discontinue the parallel processing program.

[15] "Final Report of the Task Group in SIP Processing," October 1987 (hereinafter "Report"). This Report is a public document; it was included in the docket of the Agency's Notice of Procedural Changes, 54 Fed. Reg. 2214, 2215 n.2 (1989), and much of the Report was incorporated in that notice.

[16] At the time of the Agency's analysis, all circuits that had decided the issue held that the four-month rule applies to SIP revisions, with the apparent exception of the Sixth Circuit. The Sixth Circuit resolved that possible disagreement in *Alcan*, 889 F.2d at 1518, holding that the four month rule does apply to SIP revisions.

[17] The remaining twenty percent were either air quality control region "redesignations" or source specific actions other than "relaxations." Report, *supra* n.15, at Appendix D.

Third, the Agency identified the following three factors as a major cause of SIP review delay: "[i]nordinate concern for the consequences of individual decisions," "[e]xcessive EPA review," and "[u]ncertainty concerning the outcome of the process." 54 Fed. Reg. 2214, 2216-2217 (1989). In describing its "inordinate concern for individual actions," the Agency acknowledged that it has used the SIP review process to require that "all decisions . . . be similar state to state and source to source." *Id.* at 2216. This is, of course, the antithesis of local decisionmaking (within a broad federal framework) intended by Congress. Also, the Agency conceded that "the SIP process has been depended upon as a vehicle to identify, resolve, and articulate national [EPA] policy issues, often at the expense of timely decisionmaking," *id.*, and that the Agency's policy keeps shifting. The Agency termed this the "moving target syndrome": "a SIP may be under review at EPA for months and eventually be deemed inappropriate because it doesn't conform to a newly evolved policy, even though it conformed to the policy in place when it was submitted." *Id.* Finally, EPA identified as an additional cause of delay the Agency's "nurturing" relationship with the states. *Id.* at 2217. Because of the "nurturing" relationship, "Headquarters and Regional Office personnel are reluctant to formally reject [SIP] packages." *Id.*

This, then, is the SIP process that the Agency itself describes: it is one in which EPA is excessively concerned with individual SIP decisions and drives to impose uniform federal policy on the states, even as the policy keeps shifting. At the same time, though, EPA is unwilling to take direct action against the state—either because of its "nurturing" relationship or because of the political controversy that confrontation would create. Instead, EPA *indirectly* confronts the state's decisions by bringing enforcement actions based on the prior SIP against individual sources. The individual sources then

bear the burden of the "moving target syndrome" and the delay and indecision of EPA's SIP review process. This pattern is apparent in each of the enforcement cases that have involved the SIP delay issue.

For example, in *American Cyanamid*, Louisiana submitted its SIP revision, which contained a so-called "bubble" or "emissions trading" proposal, in July 1982.[18] At the time of submission, it was the Agency's expressed policy "to encourage use of emissions trades to achieve more flexible, rapid and efficient attainment of national ambient air quality standards." 47 Fed. Reg. 15,076 (1982). But the Agency was in the process of revising its policy, a policy that had already been through several different iterations. *See* 44 Fed. Reg. 71,780 (1979); 47 Fed. Reg. 15,076 (1982); 48 Fed. Reg. 39,580 (1983). It ultimately issued a new policy in December 1986. 51 Fed. Reg. 43,814 (1986). In the interim, it brought an enforcement action against American Cyanamid. Two years after the new policy was announced, six years after the enforcement action was brought, and presumably after the nurturing had run its course, the Agency finally moved to propose to disapprove the Louisiana submission. 53 Fed. Reg. 46,636 (1988).

Similarly, in *Alcan*, the state submitted its initial SIP revision based on an emissions trading approach in July 1982. In the face of EPA inaction on the revision, the state submitted a second revision in March 1986 specifically applying the bubble policy to the Alcan plant. EPA again failed to take timely action. Instead, in December 1986, it published the new policy regarding bubble plan reviews. 51 Fed. Reg. 43,814 (1986). Without taking any formal action on the revision or otherwise

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[18] Under the bubble, or emissions trading, concept, a plant can comply with site-wide emissions limitations by means of off-setting emissions at one source within the plant with extra reductions at another source within the plant. *See American Cyanamid*, 810 F.2d at 497.

dealing definitively with the state, the Agency then filed an enforcement action.[19] Two years after the second submission, in October 1988, the Agency finally proposed to disapprove the revision—citing the new policy as the basis for its proposed disapproval. 53 Fed. Reg. 40,745 (1988). And in *General Motors*, 876 F.2d 1060, the state submitted its SIP revision in December 1985, based on an EPA policy issued in 1981. The Agency used the same pattern of a changed policy,[20] delay in review of the SIP revision, and interim enforcement action to override the state's decision.

Nor are these the only examples. The Agency has used a similar approach in other contexts, such as delayed compliance orders. *See, e.g., General Motors Corp. v. EPA*, 871 F.2d 495 (5th Cir. 1989) (Texas issued a delayed compliance order, EPA failed to act on it within the statutory time period and filed a notice of violation against General Motors).[21] More generally, EPA has as-

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[19] Prior to EPA's commencement of an enforcement action against Alcan, the Air Pollution Control District of Jefferson County had commenced an action under CAA § 304(a), 42 U.S.C. § 7604(a), in an effort to resolve the stalemate with EPA over the SIP revision. As the *Alcan* Court observed, this proved a wholly ineffective "remedy," given that EPA's final ruling on the revision came three years after the section 304(a) suit was filed and after EPA commenced its enforcement action against Alcan. *Alcan*, 889 F.2d at 1521. This, we believe, demonstrates that the First Circuit's "unreasonable delay" remedy is ineffective.

[20] The *General Motors* case illustrates another aspect of EPA's SIP process that the Agency itself has admitted: "silent" policy changes or, as the Agency calls it, "informal communication." 54 Fed. Reg. 2214, 2217 (1989). Announced policies of the Agency, such as the 1981 Volatile Organic Compounds Policy on which General Motors and the Commonwealth of Massachusetts relied, are silently eroded or altered through informal decisions within the Agency.

[21] Section 113(d) of the Act authorizes states to issue delayed compliance orders ("DCOs") to sources and requires EPA to review DCOs within ninety days. CAA § 113(d), 42 U.S.C. § 7413(d). In an action that fits precisely the pattern of the case here, EPA dis-

serted that it has the authority to "reinterpret" an existing state SIP and to bring an enforcement action against a source based on its reinterpretation, regardless of whether the state agrees with its interpretation. *See, e.g.*, 54 Fed. Reg. 40,130 (1989); 54 Fed. Reg. 36,307 (1989) (EPA final rule approving revisions to Kentucky SIP).[22]

The common denominator of these actions is the Agency's attempt to reach beyond its secondary role and assert direct control over state decisionmaking. For the Agency, enforcement cases provide an appealing mechanism for achieving greater control because they allow the Agency to avoid confrontation with the state as well as

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approved the State DCO after it had expired by its own terms and after it had issued a Notice of Violation to General Motors. As the Fifth Circuit noted in that case, "[c]ommon sense suggests that something is amiss when an agency purports to disapprove an expired order after the fact." *General Motors Corp. v. EPA*, 871 F.2d at 504. *See also Bethlehem Steel v. EPA*, 638 F.2d 994 (7th Cir. 1980).

[22] When EPA approved the Kentucky SIP, it stated that Kentucky would be obligated to follow EPA's *"current and future interpretations of the Act's provisions and regulations as well as EPA's operating policies and guidance."* 54 Fed. Reg. 36,307, 36,308 (1989) (emphasis added). Thus, EPA asserts not only the authority to interpret the Act but also to make binding on the states its "interpretations, operating policies and guidance." These interpretations, policies and guidance documents have, for the most part, never been presented to the public or even to the states for comment. The Agency provides no opportunity to challenge these documents in court or before the Agency and does not maintain a public file of the interpretations, operating procedures and guidance that will have binding effect upon the state. Several federal courts have rejected this latest attempt by EPA to override state authority and have held that EPA cannot engage in *post hoc* reinterpretation of SIP requirements. *See, e.g., United States v. General Motors Corp.*, 28 Env't Rep. Cas. (BNA) 1844 (N.D. Tex. 1988) (Court disallowed EPA's after-the-fact reinterpretation of a disputed provision in the Texas SIP). *See also United States v. Zimmer Paper Products, Inc.*, No. IP 88-194-C (S.D. Ind. Dec. 5, 1989).

the rulemaking restrictions of section 110. But it is that very appeal that underscores how the approach is inconsistent with the statute. Congress did not intend that it be easy for EPA to override state decisionmaking. As the District Court below pointed out, Congress gave the Agency the "trump card" in dealing with the states: it can always disapprove the SIP and begin enforcement action or it can promulgate a federal plan. *United States v. General Motors Corp.*, No. 87-2068-Mc (D. Mass. May 16, 1989), *reversed*, 876 F.2d 1060 (1st Cir. 1989), *cert. granted*, —— U.S. ——, 110 S.Ct. 537 (1989). The enforcement bar does not take the trump card away; it only forces the Agency to play it under the terms and conditions Congress created in recognition of the importance of state decisionmaking.

The four month deadline is reasonable and attainable, contrary to the assumption of the First and Sixth Circuit Courts. EPA's own studies prove this. EPA has elected to scrutinize SIPs and SIP revisions to a degree never contemplated by Congress and not authorized by the Act, and EPA resists any effort to limit its ability to do so. For this reason, the approach of the First and Sixth Circuits is fatally flawed.

IV. THE AGENCY'S VIEW OF THE ENFORCEABILITY OF THE PRIOR PLAN IS INCONSISTENT WITH THE REMAINDER OF THE STATUTE

At bottom, the Agency's argument for its enforcement authority rests on the following syllogism: (1) A SIP remains in effect as the "applicable implementation plan" until EPA approves a revision; (2) EPA can bring an enforcement action for violation of an "applicable" plan under section 113; and (3) therefore, EPA can bring enforcement actions against individual sources without regard to the SIP revision and the four month deadline. This argument melds the Court's decision in *Train* with a mechanical reading of section 110(d) of the Act

(which defines "applicable implementation plan") in a way that distorts the meaning of both.

This Court in *Train* set out a straightforward principle: a SIP revision does not become effective until EPA approves it. *Train*, 421 U.S. at 92. But this Court did *not* consider the effect of EPA delay past four months on that statutory principle.[23] Indeed, this Court noted on a related matter that "[w]e cannot and do not attempt to foresee, at this stage in the administration of the statute, all of the questions, to say nothing of the answers, that may arise . . . ." *Id.* at 93 n.28.

In *Train*, the Court considered whether the states and EPA may use their section 110(a)(3) revision powers, rather than other more cumbersome provisions of the Act, to grant site-specific relief. The language in *Train* often relied on by the Agency for the proposition that the existing SIP remains the "applicable" plan even four months after the state has submitted a proposed revision was not directed to the situation here. This Court noted:

> Should either [the State or EPA] *determine* that granting the variance would prevent attainment or maintenance . . ., the polluter is presumably within his rights in seeking judicial review. *This* litigation, however, is carried out on the polluter's time . . . for during *its* pendency the . . . failure to comply may subject him to a variety of enforcement procedures.

Id. at 92 (emphasis added).

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[23] The other cases typically relied on by the Agency for the principle that a SIP revision does not become effective until approved by EPA are similarly not dispositive of the issue presented here. *See United States v. Ford Motor Co.*, 814 F.2d 1099, 1102 (6th Cir. 1987), *cert. denied*, 484 U.S. 822 (1987); *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1084 (3d Cir. 1987); *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 511 F.2d 809, 812 (D.C. Cir. 1975); *NRDC v. EPA*, 478 F.2d 875, 886 (1st Cir. 1972). Not a single one of these cases involved an EPA enforcement action brought in the face of a SIP revision left pending for more than four months.

This statement was clearly directed at a situation in which EPA *has* disapproved a revision and the source then appeals that action. *Id.* It does not address the situation where neither the state nor the source has received a decision from EPA on the SIP revision. In fact, the Court in *Train* took comfort from the Agency's own assertions that it would have no difficulty meeting its statutory responsibilities. *Id.* at 93.

The Agency has taken *Train*'s straightforward principle and converted it to a statutory license to ignore the four month deadline and to undercut state decisionmaking through enforcement actions. As a result, the statutory concept of the "applicable implementation plan" is stretched beyond recognition. The statutory structure of the Clean Air Act is built upon a matching of state and federal law in the SIP. As the Agency's experience with transportation control plans demonstrates, discordance between state and federal law creates severe practical, political, and legal problems. *See generally*, R. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196 (1977). The statutory deadlines in the Act governing EPA's SIP review authority serve a critical function not only in setting the appropriate level of EPA involvement, but also in limiting the time during which there is a state command in conflict with a federal command.[24]

This limitation on the window of potential conflict—four months in the case of SIP reviews—provides sources with some certainty with respect to their compliance obligations and sets the framework for the Act's cooperative federalism. Most importantly, the Act simply does not contemplate extended periods of time where state and

[24] Similar functions are served by time deadlines governing EPA review of delayed compliance orders under CAA § 113(d), 42 U.S.C. § 7413(d), and primary nonferrous smelting orders under CAA § 119, 42 U.S.C. § 7419.

federal law differ under the "applicable" SIP.[25] EPA's misapplication of the *Train* principle creates not only equitable concerns but also fundamental confusion in the basic statutory structure.

For example, the Act requires, as a condition for the approval of a SIP, that the emission limitation it contains be enforceable as a matter of state law. CAA § 110(a)(2)(D) and (F), 42 U.S.C. § 7410(a)(2)(D) and (F). Yet in order to submit a SIP revision, the state must *adopt* the revised requirement (*see supra* n.5), thus directly affecting the enforceability, as a matter of state law, of the prior SIP. In section 176(b) of the Act, Congress directed EPA to cut off grants under the Act to a state that "is not implementing any requirement of an approved or promulgated plan under section 7410 of this Title." CAA § 176(b), 42 U.S.C. § 7506(b). Congress used mandatory language for this provision: "the Administrator *shall* not make any grants under this chapter" if the state is not implementing the applicable plan. *Id.* (emphasis added). Does this mean that after the four month review period has passed without EPA decision, the *state* is subject to a funding cutoff? It is no answer to say that EPA would never take such an action penalizing a state for the Agency's own delay. Under section 304 of the Act, citizens can sue to enforce this mandatory duty. CAA § 304, 42 U.S.C. § 7604.

The funding sanctions, mandatory duties, and citizen suit provisions in the Act presume a clarity in the determination of the "applicable plan" that EPA's approach destroys. At a minimum, the structure of the statute is premised on prompt decisions by EPA harmonizing federal and state obligations. Under EPA's theory, a source would be subject to a citizen suit throughout the

[25] Exceptions to this rule occur in the context of Federal Implementation Plans (FIPs), CAA § 110(c), 42 U.S.C. § 7410(c), and "more stringent" state laws, CAA § 116, 42 U.S.C. § 7416.

period of EPA's delay. And this would be true even if the Agency intended to approve the plan. This, in and of itself, would chill SIP revisions and hence discourage states from adopting (and sources from accepting) control limitations on the edge of technological feasibility.[26] States and sources would know that any relief from those standards would be highly problematic given the likelihood of EPA delay and the possibility of citizen suits. The very act of delay by EPA would thus hold states (and sources) hostage to potential citizen suits.

In addition, under EPA's reading, individual sources are faced with an intolerable Hobson's choice. SIP revisions cannot always be neatly categorized as more or less stringent than the prior SIP. It is often the case, for example, that a state will revise its SIP to tighten an emission limitation but provide the necessary addi-

[26] It should be noted here that the First Circuit misread section 110(g) of the Act in suggesting that this section evidences Congress's understanding that EPA may enforce a prior SIP after the four month review period has passed. CAA § 110(g), 42 U.S.C. § 7410(g). *General Motors*, 876 F.2d at 1069 n.6. Section 110(g) provides that a state may issue a "temporary emergency suspension" of the prior SIP if the state has submitted a SIP revision "which the Administrator has not approved or disapproved under this section *within* the required four month period . . . ." CAA § 110(g)(1), 42 U.S.C. § 7410(g)(1) (emphasis added). The state's authority under the section is limited to situations of severe economic emergency, and the suspension can only last for four months. The First Circuit assumed that this suspension authority dealt with situations in which EPA had missed the four month deadline, and, therefore, concluded that the enforcement bar is inconsistent with the section. In fact, though, section 110(g) deals with the state's authority to suspend its prior SIP *within* EPA's four month review period. The section thus provides a very limited entitlement to the states to take action before EPA has had its chance to review the SIP revision. The First Circuit's reading both ignores the statutory term "*within* the required four month period" and renders the emergency authority hollow, since the "emergency suspension" could not take effect until four months after submission, hardly an expeditious, "emergency" time frame.

tional time to meet that tighter limit. What are the source's compliance obligations under these circumstances as EPA delays? EPA's statutory approach leaves the source in the dark for an extended period of time and effectively gives greater statutory weight to EPA's inaction than to the state's deliberate decision.

We raise these questions to illustrate a basic point: the statutory definition of "applicable implementation plan"—which explicitly references revisions that "[have] been *approved under subsection (a)*," CAA § 110(d), 42 U.S.C. § 7410(d) (emphasis added)—must, if the statute is to make sense, incorporate the time deadlines of that subsection. The statutory term "has been approved under subsection (a)" refers to more than a single temporal event, approval, that binds the state to federal law; it also refers to EPA's authority *and* obligation under the subsection to act in a specified manner toward the state. The authority to disapprove cannot be split from the correlative obligation to decide. Otherwise, the limited and manageable window of potential federal/state conflict becomes a broad gash in the statute, and the parallel enforcement authorities of the federal and state government would be skewed in favor of the federal government.

Under either the statutory or common sense understanding of the term, as EPA delays years in the review of a SIP revision, the state is not remiss in its duty to enforce the "applicable" plan; it is not subject to a funding cutoff any more than the individual source is subject to an enforcement action. The *dual* actions of the state, in submitting the revision, and EPA, in failing to meet its review obligations under section 110(a)(3)(A), have compromised the foundation of the applicability of the prior plan.[27] Once outside of the statutorily allowed four

[27] This would not mean, however, that EPA's delay renders any subsequent Agency approval (or disapproval) invalid. It is only

month period, unless and until the Agency acts on the state's submission, the prior plan cannot be considered "applicable" within the meaning of section 110(d).

This reading of section 110(d) is the one most consistent with the remainder of the statute and reinforces the correctness of the enforcement bar approach of *American Cyanamid*. Moreover, any approach which would permit retroactive application of EPA's action, such as the approach of the D.C. Circuit in *Duquesne*, is inconsistent with the doctrine that a statutory grant of legislative rulemaking authority shall not be construed to convey the power to apply retroactive rules unless the statute expressly provides. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, —— U.S. ——, 109 S.Ct 468 (1988) Here, the statute does not provide for retroactivity, and it would be manifestly unfair to allow substantial accumulation of penalties against individual sources based on EPA's non-compliance with the statute.[28]

Finally, the Agency argues that its interpretation is necessary to fend off attempts by the states to enact improper relaxations of Clean Air standards. In the First Circuit, the Agency argued that with the enforcement bar, "states might simply flood the Agency with disingenuous SIP revisions at the behest of influential companies." *General Motors*, 876 F.2d at 1067. Not only is this argument a disservice to the states, but it is also factually unsupported. In the two and a half years that *American Cyanamid* has been the governing precedent in the Fifth Circuit, we are not aware of, and EPA has not pointed to, any increase in "disingenuous" SIP revisions,

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during the period of delay, when EPA has failed to meet its decisional obligation under section 110(a)(3)(A), that the "applicability" of the plan is compromised.

[28] Also, as discussed, it will often not be clear to the source whether the Clean Air Act requires compliance with the revised state law or the prior SIP.

never mind a "flood" of such revisions. But even if EPA's self-serving specter of state irresponsibility were accepted, Congress provided EPA with broad authorities that would directly address that problem. EPA can assume federal enforcement of the state plan, CAA § 113(a)(2), 42 U.S.C. § 7413(a)(2); it can promulgate a federal plan in place of the state plan, CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1); it can cut off grants to the state, CAA § 176, 42 U.S.C. § 7506; it can ban the construction of any new or modified major source in the area, CAA § 173(4), 42 U.S.C. § 7503(4); it can bring an action to halt any imminent endangerment, CAA § 303, 42 U.S.C. § 7603; and, of course, it can disapprove any revision and bring an enforcement action against the individual source. With this array of authorities, it is nothing short of ridiculous for the Agency to claim that it needs the threat of enforcement during the pendency of delayed SIP review to stem the tide of improper SIP revisions.

It should be emphasized that the *American Cyanamid* rule places only a limited restriction on the Agency's authority: the Agency cannot enforce a prior SIP where a SIP revision has been pending for more than four months until it disapproves that revision, and it cannot collect penalties for the period of its own delay. These restrictions are entirely within the Agency's ability to control, and, as discussed, there is no sound reason why the Agency cannot meet the four month deadline. The Congressional mandate here is straightforward: EPA must act on state submissions within four months. This Court should hold the Agency to that requirement.

CONCLUSION

For these reasons, the *amici curiae* respectfully urge this Court to rule that when EPA fails to take action on a SIP revision within the four month period for review, then (1) EPA may not bring an enforcement action for failure to comply with an existing SIP unless and until it rejects the pending SIP revision, and (2) EPA may not collect penalties for the period between (a) the end of the four month period for review and (b) the date that EPA rejects the revision.

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